A

# PERNAS OUE (KL) SDN BHD TRADING AS HOTEL ISTANA v. MENTERI SUMBER MANUSIA MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
B HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-01-409-12-2013]
7 NOVEMBER 2016

C ***ADMINISTRATIVE LAW:*** *Remedies – Certiorari – Judicial review – Application to quash Minister's order for Hotel to give recognition to Union – Process of ascertaining whether workmen were members of Union – Whether membership check should be by secret ballot or membership verification exercise – Whether relevant date for determination of membership check was date of claim for*
D *recognition – Failure of High Court to grant consequential mandamus order – Whether claim for recognition concluded or void – Whether doctrine of functus officio arose*

This was an appeal against the decision of the High Court dismissing the appellant's application for an order of *certiorari* to quash the order of the first
E respondent ('the Minister') ordering the appellant ('the hotel') to give recognition to the fourth respondent ('the Union') for all employees except those employed in a managerial, executive, confidential and security capacity. On 30 May 2000, the Union submitted a claim for recognition to the hotel pursuant to s. 9(2) of the Industrial Relations Act 1967 ('the Act').
F Pursuant to s. 9(3)(c) of the Act, the hotel informed the Union and the third respondent ('DGIR') that the hotel wished to apply to the DGIR to ascertain whether the workmen in respect of whom recognition was being sought were members of the Union. The hotel informed the DGIR that it wished the membership check be conducted by way of a secret ballot. However, the
G Union informed the second respondent ('DGTU') that a membership verification exercise should be conducted as opposed to a secret ballot due to the fact that since the date of recognition was on 30 May 2000, many employees of the hotel had left and could not be contacted. The DGTU proceeded to carry out a secret ballot on the membership check and the
H results showed that 17.1% of the employees within the scope of the Union in the hotel had become members of the Union. In view of the results of the secret ballot, the Minister issued a decision ('Minister's first decision') that the Union was not accorded recognition by the hotel. The Union filed judicial review proceedings, registered as judicial review application ('first judicial review application), against the Minister's first decision. The High
I Court quashed the Minister's first decision but did not proceed to order a *mandamus* compelling the Minister to direct that the membership check be conducted by way of a verification exercise by the DGTU in relation to the

Union's notice of claim for recognition ('the first High Court decision'). A membership verification exercise was subsequently conducted and it was found that 57.4% of the workmen in the hotel had become members of the Union on 30 May 2000 which was the date of recognition. Consequently, the Minister, pursuant to s. 9(5) of the Act, made the second decision which ordered the hotel to accord recognition to the Union with effect from 30 May 2000. The hotel then filed a judicial review application ('second judicial review application') to quash the Minister's second decision. The High Court dismissed the second judicial review application, hence the hotel appealed. The hotel submitted, *inter alia*, that the High Court had committed a serious error of law in the second judicial review application when it failed to appreciate that when the High Court quashed the Minister's first decision in the first judicial review application without any consequential order, it had effectively rendered the entire recognition process of the Union to be declared null and void.

**Held (dismissing appeal with costs)**
**Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:**

**(1)** The first High Court decision had the effect of quashing the Minister's first decision as if it was never made. That being the case, it had left the Minister with the ability to make another decision based on the claim for recognition by the Union. The quashing order was only in respect of the Minister's first decision and did not have the effect of quashing also the Union's claim for recognition, which was left intact for the Minister's further consideration. (paras 36 & 37)

**(2)** For the purpose of the Union's claim for recognition in this case, the relevant date for the determination of the membership check was the date of the claim for recognition, which was 30 May 2000. So, if the membership check was by secret ballot, only workmen who were employed on 30 May 2000 were eligible to vote in the secret ballot. Workmen employed subsequent to 30 May 2000 were not eligible to vote even though they were members of the Union. The Union had objected to the secret ballot on the ground that it would be grossly unfair as most of its workmen would have left the employment of the hotel and were unlikely to return to cast their votes. The High Court, in its first decision, had agreed with the Union's views. (paras 41 & 42)

**(3)** The failure of the High Court to grant a consequential *mandamus* order did not mean that the claim for recognition dated 30 May 2000 was concluded or void. When the Minister's first decision was quashed, it not only quashed the Minister's decision *per se* but also all the actions taken by the DGIR and DGTU relating to the taking of the secret ballot on which the Minister's first decision was based. This then would leave the claim for recognition dated 30 May 2000 still unresolved. In the circumstances, the Minister was not *functus officio* and must instead

reconsider the claim for recognition and make a fresh decision, which he did in the form of the Minister's second decision, after the membership verification exercise was conducted by the DGIR and its results reported to the Minister. Therefore, the High Court Judge did not err in her decision to dismiss the second judicial review application. (paras 43 & 44)

***Bahasa Malaysia*** *Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi menolak permohonan perayu untuk perintah *certiorari* membatalkan perintah responden pertama ('Menteri') yang mengarahkan perayu ('hotel') memberikan pengiktirafan kepada responden keempat ('Kesatuan') untuk semua pekerja kecuali yang bekerja dalam kapasiti pengurusan, eksekutif, sulit dan keselamatan. Pada 30 Mei 2000, Kesatuan menyerahkan satu tuntutan pengiktirafan kepada hotel menurut s. 9(2) Akta Perhubungan Perusahaan 1967 ('Ákta'). Di bawah s. 9(3)(c) Akta, hotel memaklumkan kepada Kesatuan dan responden ketiga ('DGIR') bahawa hotel ingin memohon kepada DGIR bagi memastikan sama ada pekerja-pekerja yang cuba diiktirafkan adalah ahli-ahli Kesatuan. Hotel memaklumkan kepada DGIR bahawa ia mengharapkan pemeriksaan keahlian dijalankan melalui undi rahsia. Walau bagaimanapun, Kesatuan memaklumkan kepada responden kedua ('DGTU') bahawa latihan pengesahan keahlian harus dilakukan bertentangan dengan undi rahsia kerana memandangkan tarikh pengiktirafan adalah 30 Mei 2000, terdapat beberapa pekerja yang telah meninggalkan hotel itu dan tidak dapat dihubungi. DGTU meneruskan proses undi rahsia ke atas pemeriksaan keahlian dan hasil kajian menunjukkan bahawa 17.1% pekerja-pekerja dalam skop Kesatuan dalam hotel telah menjadi ahli-ahli Kesatuan. Akibat hasil kajian tersebut, Menteri mengeluarkan keputusan ('keputusan pertama Menteri') bahawa Kesatuan tidak diberikan pengiktirafan oleh hotel. Kesatuan memfailkan prosiding semakan kehakiman yang didaftarkan sebagai permohonan semakan kehakiman ('permohonan semakan kehakiman pertama') terhadap keputusan pertama Menteri. Mahkamah Tinggi membatalkan keputusan pertama Menteri tetapi tidak membuat perintah *mandamus* mewajibkan Menteri mengarahkan pemeriksaan keahlian dilakukan melalui latihan pengesahan oleh DGTU berhubungan dengan notis tuntutan pengiktirafan Kesatuan ('keputusan pertama Mahkamah Tinggi'). Satu latihan pengesahan keahlian dilakukan kemudiannya dan didapati 57.4% pekerja-pekerja hotel adalah ahli Kesatuan pada 30 Mei 2000 iaitu tarikh pengiktirafan. Oleh itu, Menteri, menurut s. 9(5) Akta, membuat keputusan keduanya yang memerintahkan hotel memberikan pengiktirafan kepada Kesatuan berkuat kuasa dari 30 Mei 2000. Hotel kemudiannya memfailkan permohonan semakan kehakiman ('permohonan semakan kehakiman kedua') untuk membatalkan keputusan kedua Menteri. Mahkamah Tinggi menolak permohonan semakan kehakiman kedua, oleh itu hotel merayu. Hotel menghujahkan antara lain,

bahawa, Mahkamah Tinggi membuat satu kesilapan undang-undang yang serius apabila ia gagal mempertimbangkan bahawa apabila Mahkamah Tinggi membatalkan keputusan pertama Menteri dalam permohonan semakan kehakiman pertama tanpa apa-apa perintah lanjut, ia menyebabkan seluruh proses pengiktirafan Kesatuan diisytiharkan tidak sah dan terbatal.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:**

**(1)** Keputusan Mahkamah Tinggi mempunyai kesan membatalkan keputusan pertama Menteri seolah-olah ia tidak pernah diputuskan. Dengan itu, ia telah memberikan keupayaan kepada Menteri untuk membuat keputusan lain berdasarkan tuntutan pengiktirafan oleh Kesatuan. Perintah pembatalan hanyalah berkenaan keputusan pertama Menteri dan juga tidak mempunyai kesan membatalkan tuntutan pengiktirafan Kesatuan, yang kekal utuh untuk pertimbangan selanjutnya oleh Menteri.

**(2)** Untuk tujuan tuntutan pengiktirafan Kesatuan dalam kes ini, tarikh relevan untuk pemutusan pemeriksaan keahlian adalah tarikh tuntutan pengiktirafan, iaitu pada 30 Mei 2000. Jika pemeriksaan keahlian dibuat melalui undi rahsia, hanya pekerja yang bekerja pada 30 Mei 2000 layak mengundi dalam undian rahsia. Pekerja-pekerja yang bekerja selepas 30 Mei 2000 tidak layak untuk mengundi walaupun mereka adalah ahli-ahli Kesatuan. Kesatuan telah membantah undi rahsia atas alasan bahawa ia tidak adil kerana kebanyakan pekerja telah berhenti bekerja dengan hotel dan tidak mungkin kembali untuk mengundi. Mahkamah Tinggi, dalam keputusan Mahkamah Tinggi pertama, bersetuju dengan pandangan Kesatuan.

**(3)** Kegagalan Mahkamah Tinggi memberikan perintah *mandamus* selanjutnya tidak bermakna tuntutan pengiktirafan bertarikh 30 Mei 2000 muktamad atau terbatal. Apabila keputusan pertama Menteri dibatalkan, ia bukan sahaja membatalkan keputusan Menteri tetapi juga segala tindakan yang diambil oleh DGIR dan DGTU berhubungan dengan undi rahsia yang digunakan sebagai asas keputusan pertama Menteri. Ini menyebabkan tuntutan pengiktirafan bertarikh 30 Mei 2000 masih tidak dapat diselesaikan. Dalam keadaan ini, Menteri bukan *functus officio* dan harus mempertimbangkan semula tuntutan pengiktirafan dan membuat keputusan baru, yang telah dibuat beliau dalam bentuk keputusan kedua Menteri, selepas latihan pengesahan keahlian dilakukan oleh DGIR dan keputusannya dilaporkan kepada Menteri. Oleh itu, Hakim Mahkamah Tinggi tidak khilaf dalam keputusannya menolak permohonan semakan kehakiman kedua.

**Case(s) referred to:**
*Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC* ***(refd)***

**Legislation referred to:**
Industrial Relations Act 1967, s. 9(2), (3)(c), (4B)(b), (5)
Trade Unions Act 1959, s. 26(3)
Trade Unions Regulations 1959, regs. 62, 63

**Other source(s) referred to:**
Clive Lewis, *Judicial Remedies In Public Law,* Sweet & Maxwell, 5th edn, pp 214-215, paras 6-016

*For the appellant - N Sivabalah & Wong Kian Jun; M/s Shearn Delamore & Co*
*For the 1st - 3rd respondents - Maisarah Juhari, SFC; AG's Chambers*
*For the 4th respondent - Shireen Ann Selvaratnam & Mohd Azri Mohamad Ghazali; M/s Sreenevasan*

*[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-29-02-2013 (affirmed).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Umi Kalthum Abdul Majid JCA:**

**[1]** This appeal is against the decision of the learned High Court Judge who had dismissed the appellant's application for an order of *certiorari* to quash the order of the first respondent ("the Minister") made on 6 November 2012 ("the Minister's second decision") ordering the appellant ("the hotel") to give recognition to the fourth respondent ("the Union") with effect from 30 May 2000 for all employees except those employed in a managerial, executive, confidential and security capacity.

**Brief Facts**

**[2]** From the submissions of parties, the brief facts can be stated as follows.

**[3]** On 30 May 2000, the Union submitted a claim for recognition to the hotel pursuant to s. 9(2) of the Industrial Relations Act 1967 ("the Act") for all workmen employed by the hotel except those in the managerial, executive, confidential or security capacity.

**[4]** *Vide* letters dated 16 and 17 June 2000, and pursuant to s. 9(3)(c) of the Act, the hotel informed the Union and the third respondent ("DGIR") that the hotel wished to apply to the DGIR to ascertain whether the workmen in respect of whom recognition was being sought are members of the Union or not.

**[5]** Thereafter, the Union had on 9 May 2001, 3 June 2002 and 21 November 2003 written to the DGIR to enquire on the status of their recognition claim in view of the inordinate delay.

**[6]** *Vide* letter dated 27 September 2004, the Union informed the DGIR that there had been an inordinate delay without any plausible reason in ascertaining whether workmen in respect of whom recognition is sought are indeed members of the Union or not. The Union had also stated that due to the delay and the high turnover rate in the hotel industry many of the workers have since left the services of the hotel since the recognition was sought by the Union on 30 May 2000.

**[7]** *Vide* letter dated 29 November 2004, the Hotel informed the DGIR that it wished the membership check be conducted by way of a secret ballot.

**[8]** Pursuant to s. 9(4B)(b) of the Act, the DGIR had on 18 October 2005, through a letter, referred the matter to the second respondent ("the DGTU") to conduct a membership check to ascertain the membership of the Union.

**[9]** *Vide* letter dated 8 November 2005, the Union again informed the DGIR that there had been an inordinate delay in processing the Union's claim for recognition which was filed on 30 May 2000.

**[10]** *Vide* letter dated 3 January 2006, the Union informed the DGTU that a membership verification exercise should be conducted as opposed to a secret ballot due to the fact that since the date of recognition on 30 May 2000 many employees of the hotel had since left and could not be contacted.

**[11]** The DGTU, through his letter dated 26 September 2006, informed the hotel and the Union that the membership check would be conducted by way of a secret ballot.

**[12]** On 9 November 2006, the DGTU carried out a secret ballot on the membership check.

**[13]** *Vide* letter dated 27 March 2007, the DGIR informed the hotel that the DGTU had conducted a membership check and the results showed that 17.1% of the employees within the scope of the Union in the hotel had become members of the Union as of 30 May 2000.

**[14]** *Vide* letter dated 9 April 2007, the hotel informed the Union that pursuant to the result of the membership check which showed only 17.1% of the employees within the scope of the Union in the hotel had become members of the Union as of 30 May 2000 and as a result the hotel had decided not to accord recognition to the Union.

**[15]** Subsequently, in view of the results of the secret ballot, the Minister issued a decision on 20 June 2007 ("Minister's first decision") that the Union was not accorded recognition by the hotel.

**[16]** The Union filed judicial review proceedings registered as Judicial Review Application No. R4(1)-25-192-2007 ("first judicial review application") against the Minister's first decision seeking the following reliefs:

A
1. A declaration that:

(i) The secret ballot process defeats the object, intent and purpose of section 9(3)(c) of the Industrial Relations Act 1967 and section 26(3) of the Trade Unions Act 1959.

(ii) Regulation 35(2) of the Trade Unions Regulations 1959 offends
B Articles 5, 8 and 10 of the Federal Constitution;

2. An order of *Certiorari* to remove into the High Court and to quash the decision dated 20.6.2007 handed down by the 1st Respondent wherein the 1st Respondent decided that no recognition be accorded to the Applicant, the National Union of Hotel, Bar &
C Restaurant Workers, Peninsular Malaysia, by the 4th Respondent;

3. An order of *Mandamus* compelling the 1st Respondent to direct that the membership check be conducted by way of verification exercise by the 2nd Respondent in relation to the Applicant's Notice of Claim for Recognition dated 30.5.2000;

D
4. All necessary and consequential relief, orders and/or directions;

5. Costs.

**[17]** On 16 March 2010, the High Court quashed the Minister's first decision but did not proceed to order a *mandamus* compelling the Minister
E to direct that the membership check be conducted by way of a verification exercise by the DGTU in relation to the Union's notice of claim for recognition dated 30 May 2000 ("first High Court decision")

**[18]** Following the first High Court decision, and after taking legal advice from the Attorney-General's Chambers, a membership verification exercise
F was conducted on 6 April 2011. The hotel was informed of the DGTU's intention to conduct membership verification exercise *vide* letter dated 31 March 2011 but did not raise any objection at the material time.

**[19]** *Vide* letter dated 8 November 2012, the DGIR informed the hotel that pursuant to membership check which was conducted by way of a
G membership verification exercise, it was found that 57.4% of the workmen in the hotel had become members of the Union on 30 May 2000 which was the date of recognition. Consequently, the Minister, pursuant to s. 9(5) of the Act and through Form F dated 6 November 2012, made the Minister's second decision which ordered the hotel to accord recognition to the Union
H with effect from 30 May 2000.

**[20]** The hotel then filed a judicial review application ("the second judicial review application") to quash the Minister's second decision. The High Court dismissed the second judicial review application on 6 November 2013 ("second High Court decision"), hence the hotel is now appealing to this
I court.

## At The High Court

**[21]** At the High Court, two issues were raised as follows:

(a) apakah kesan perintah Mahkamah Tinggi yang bertarikh 16 Mac 2010 itu yang telah menolak perintah pertama Menteri tetapi tidak membuat perintah *mandamus*?;

(b) adakah notis tuntutan pengiktirafan yang bertarikh 30 Mei 2000 dianggap telah diputuskan atau masih belum selesai?

**[22]** The hotel's position was that the entire recognition process was declared null and void when the High Court in the first High Court decision had quashed the Minister's first decision in the first judicial review application without any consequential order.

**[23]** The Union's position was that following the first High Court decision, the claim for recognition remained unresolved and pending and the Minister is legally obliged to make a decision on it.

**[24]** The learned High Court Judge, in making the second High Court decision, found that the High Court in its first High Court decision did not dismiss the prayer for a *mandamus*, but had only declined to make the order in respect of that prayer. That the Minister was not *functus officio* seeing that the Union's claim for recognition was still outstanding and required to be resolved. Therefore, the said learned High Court Judge declined to disturb the Minister's second decision.

## The Appeal

*The Hotel's Submission*

**[25]** Before us, the hotel submitted that the High Court had committed a serious error of law in the second judicial review application when it failed to appreciate that when the High Court quashed the Minister's first decision in the first judicial review application without any consequential order, it had effectively rendered the entire recognition process of the Union to be declared null and void. That the first judicial review application was filed to challenge the Minister's first decision which was made after the Minister had decided on the competency of the Union to represent the said employees and whether the Union had sufficient membership. After going through the requisite process, the Minister made his decision not to grant the Union recognition as the secret ballot revealed that it had insufficient members. An order of *certiorari* was handed down by the High Court to quash the Minister's first decision not to grant recognition to the Union. That in view of the *certiorari* being awarded, it meant that the decision-making process (Union's recognition claim) was flawed and therefore cannot be allowed to stand.

**[26]** Further, it was submitted that in view of the first High Court decision in the first judicial review application in quashing the Minister's first decision and in the absence of an order for *mandamus* and/or consequential orders meant that the first High Court decision had effectively rendered the entire recognition process initiated by the Union null, void and extinguished. As the recognition process was null and void, the Minister has no authority to revive the very same process that had been nullified by the High Court in the first judicial review application and to instruct the DGTU to conduct a membership verification exercise which resulted in the hotel subsequently challenging the said decision in the second judicial review application being the subject matter of the present appeal.

**[27]** It was also submitted that in the first judicial review application, the High Court had granted the order for *certiorari* and quashed the Minister's first decision. The High Court, however, had declined to order the prayer for *mandamus* directing the DGTU to conduct a membership check by way of membership verification exercise. By that means, the High Court had effectively extinguished the Union's recognition application. Therefore, the Minister, DGIR and DGTU had no jurisdiction and/or authority to act any further with regards to the Union's recognition claim of 30 May 2000. The High Court in the second judicial review application had failed to consider that the first High Court decision in merely quashing the Minister's first decision without any order of *mandamus* and/or consequential orders had effectively extinguished the recognition process of the Union made on 30 May 2000. That in allowing the DGTU to proceed to conduct a membership verification exercise, the Minister went against the first High Court decision in not granting *mandamus* and/or consequential orders. The High Court failed to appreciate the Minister's action in doing so amounted to an error of law, acted in excess and/or in the absence of jurisdiction and in the process acted *functus officio*.

**[28]** It was further submitted that despite the High Court in the first judicial review application declining to make an order of *mandamus* compelling the Minister to instruct that a membership verification exercise be conducted, the Union did not appeal against the first High Court decision. This would mean that the Union's recognition claim would have ended and that the only way to proceed was for the Union to file a fresh recognition claim by virtue of s. 9(2) of the Act, which it failed to do. The High Court had therefore committed an error of law, acted in excess and/or in the absence of jurisdiction when it failed to direct its mind to the fact that the absence of an order of *mandamus* the Minister was acting *functus officio* when it purported to make the Minister's second decision to accord recognition to the Union.

*Respondents (1), (2), (3) Submission*

**[29]** It was submitted by the Minister that the learned High Court Judge had correctly pointed out that the process of recognition under s. 9 of the Act was not *functus officio* because it was clear that the first High Court decision was only to quash the Minister's first decision. The Union's Form A dated 30 May 2000 was still intact and there was still unfinished business on the recognition claim to the Minister, DGTU and DGIR to carry out. The hotel did not object to the process of verification being conducted (despite two letters had been sent by the DGTU to inform the hotel such process would be conducted) and as stipulated under s. 9(3) of the Act read together with reg. 63 of the Trade Unions Regulations 1959, wherein the process of recognition way be done either by secret ballot or by way of verification exercise by the DGIR. That the Minister had complied with the provisions of the relevant law relating to claim for recognition wherein he had affirmed that:

(a) he had considered and perused all the facts, reports and documents submitted to him, which included the first High Court decision and the claim for recognition made by the Union had not been resolved and still on-going pursuant to that order of the court;

(b) he had been informed by the DGIR on what had happened after the first High Court decision and the legal opinions given by the Attorney-General's Chambers in order to resolve the recognition claim by the Union;

(c) he has considered that the first High Court decision had only quashed the Minister's first decision and not the Union's claim for recognition;

(d) that a membership check by way of verification exercise was carried out by the DGTU as it was part of the recognition process under s. 9 of the Act. The DGTU did so because the Minister's first decision was founded on the result of a secret ballot which was set aside by the High Court;

(e) he was not *functus officio*. The decision to accord recognition to the Union was made according to law since the Union's claim for recognition remained pending which was consonant with the non-giving of the said orders pursuant to prayers 1 and 3 by the learned High Court Judge in the first High Court decision except for prayer 2;

(f) the DGIR and DGTU had all acted fairly, properly and reasonably in the exercise of their respective powers under the law; and

(g) therefore, his decision to accord recognition to the Union was valid and legally enforceable and not *functus officio*.

**[30]** It was also submitted that the first High Court decision to quash the Minister's first decision did not extinguish the whole process of recognition for otherwise it would go against the provisions of the Act and the Trade

Unions Act 1959 ("Trade Unions Act"). The Federal Court case of *Ranjit Kaur S. Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] MLJU 686 was referred as holding that, per Raus Sharif (FCJ),"… the underlying objectives and purposes of the Act is to ensure social justice to both employers and employees and to advance the progress of industry by bringing harmony and cordial relationship between the parties and to eradicate unfair labour practices, to protect workmen against victimisation by employers and to ensure termination of industrial disputes in a peaceful manner."

*The Union's Submission*

**[31]** It was submitted by the Union that the effect of quashing the Minister's first decision without granting a *mandamus* merely meant that the Minister must reconsider to claim for recognition by the Union and make a fresh decision provided he does not repeat the error or make any further reviewable errors. The Minister was not *functus officio*. Having quashed the Minister's first decision on the basis that the secret ballot was not a fair method to conduct the membership check in this case in view of the inordinate delay, the Union's claim for recognition remained unresolved and the DGIR's jurisdiction to ascertain the percentage of membership had not been exhausted. The claim for recognition is only resolved if the Union withdraws its claim or once there is a decision by the Minister to either accord recognition or not. Hence, the issue of *functus officio* does not arise as long as the claim for recognition is unresolved. That in fact, the DGTU, DGIR and the Minister are legally obliged to deal with the Union's claim for recognition.

**[32]** In the premises, it was submitted that the DGIR's conduct in directing a membership verification exercise to determine the membership percentage was within his powers and jurisdiction and the Minister's subsequent decision (the Minister's second decision) based on the results of the membership verification exercise was reasonable and without any error of law. The Minister's second decision had relied on the reasonable conduct of the DGIR in seeking legal advice from the Attorney-General's Chambers before deciding on the consequence of the first High Court decision.

**[33]** At all material times, the hotel was fully aware that a second membership check was going to be conducted by way of a membership verification exercise, yet chose not to object until the results were revealed. Therefore, the position taken by the hotel on the interpretation of the first High Court decision was an afterthought.

**[34]** It was submitted that the Minister's decision is a statutory obligation the moment s. 9(3) of the Act is invoked and is not dependent on whether there is a court order directing him to make a decision.

**[35]** That the Union's claim for recognition dated 30 May 2000 was submitted 14 (now 16) years ago and the Union is still being prevented from entering into collective bargaining with the hotel. To require a fresh claim for recognition to be submitted by the Union is unnecessary and would prejudice the Union and the workmen further as the process is long drawn and throughout the entire period, the interest of the workmen will remain unrepresented.

## Our Decision

**[36]** The question which we need to ask ourselves was, what was the effect of the first High Court decision when it quashed the Minister's first decision? We were of the view that the first High Court decision had the effect of quashing the Minister's first decision as if it was never made. That being the case, it had left the Minister with the ability to make another decision based on the claim for recognition by the Union. Clive Lewis in his book entitled *"Judicial Remedies In Public Law"*, Sweet & Maxwell, at pp. 214-215, para. 6-016, 5th edn, had this to say on the effect of a quashing order:

> **The effect of a quashing order**
>
> 6-016 Decisions that are *ultra vires* are nullities. *The effect of granting a quashing order is to established that a decision is ultra vires and to set the decision aside. The decision is retrospectively invalidated, and deprived of legal affect since its inception.* Judicial review is a supervisory not an appellate jurisdiction. *The court can only ensure that a decision has been reached lawfully, and if not, quash the unlawful decision.* The court cannot substitute an alternative decision for that of the decision – maker. Thus, where the Secretary of State had adopted unlawful criteria for determining whether to make *ex gratia* payments, the appropriate remedy was to declare that the criteria adopted were unlawful. It was not, however, for the court to determine what new criteria should be adopted. That was for the Secretary of State. *In many circumstances, the decision-maker will be free to reconsider the matter and to make a fresh decision (which may even be the same as the original decision) providing that in doing so he does not repeat the error or make any further reviewable error.* (emphasis added)

**[37]** We must emphasise here that the quashing order was only in respect of the Minister's first decision and did not have the effect of quashing also the Union's claim for recognition, which was left intact for the Minister's further consideration.

**[38]** When the Union made the claim for recognition, the Union was holding out to the hotel that a majority of its workmen are members of its Union and the hotel ought to, therefore, recognise the Union as being able to represent its members through collective bargaining, to negotiate and conclude the terms and conditions of their employment with the hotel.

**[39]** The hotel, at its option under s. 9(3) of the Act, applied to the DGIR to ascertain whether the workmen in respect of whom recognition were being sought are members of the Union. DGIR, pursuant to s. 26(3) of the Trade Unions Act 1959, requested the DGTU to carry out a membership check in such manner as prescribed by the Trade Unions Regulations 1959 ("the Regulations") in order to ascertain the percentage of workmen in respect of whom recognition were being sought, who are members of the Union.

**[40]** Regulation 62 of the Regulations provided two methods to conduct the membership check, that is, by membership verification exercise or by secret ballot. These two methods have been defined in the Regulations as:

> "membership verification exercise" means an exercise for verification of membership through checking membership application forms and other relevant records kept by a trade union of workmen which has made a claim for recognition;
>
> "secret ballot" means a secret ballot taken under these Regulations for the purpose of determining the percentage of workmen or any class of workmen, in respect of whom a claim for recognition is being sought, who are members of the union making the claim; '

**[41]** For the purposes of the Union's claim for recognition in this case, the relevant date for the determination of the membership check was the date of the claim for recognition, which was 30 May 2000. So, if the membership check was by secret ballot, only workmen who were employed on 30 May 2000 were eligible to vote in the secret ballot. Workmen employed subsequent to 30 May 2000 are not eligible to vote even though they are members of the Union. If the membership verification exercise were to be conducted, it would similarly only take into account workmen who were shown to have been employed on 30 May 2000 and shown to be members of the Union on that date.

**[42]** What happened was that when the first membership check was conducted, it was by way of a secret ballot, which showed that the Union did not have the majority of workmen as its members. But the secret ballot took place 6 ½ years after the recognition claim was submitted. This led to the Union objecting to the secret ballot on the ground that it would be grossly unfair as most of its workmen would have left the employment of the hotel after 6 ½ years and are unlikely to return to cast their votes. The High Court, in the first High Court decision, had agreed with the Union's views and therefore quashed the Minister's first decision but did not order for a *mandamus* to be issued (although prayed for by the Union) that a membership verification exercise be conducted in relation to the still unresolved claim for recognition dated 30 May 2000.

**[43]** We agreed with the submissions of the respondents that the failure of the High Court to grant a consequential *mandamus* order does not mean that the claim for recognition dated 30 May 2000 was concluded or void. When

the Minister's first decision was quashed, it not only quashed the Minister's decision *per se* but also all the actions taken by the DGIR and DGTU relating to the taking of the secret ballot on which the Minister's first decision was based. This then would leave the claim for recognition dated 30 May 2000 still unresolved.

**[44]** We therefore, agreed with the respondents' submission that in the circumstances the Minister was not *functus officio* and must instead reconsider the claim for recognition and make a fresh decision, which he did in the form of the Minister's second decision, after the membership verification exercise (being the other method of membership check) was conducted by the DGIR and its results reported to the Minister. We therefore, found that the learned High Court Judge did not err in her decision to dismiss the second judicial review application.

**[45]** Lastly, we would echo the words of Raus Sharif (FCJ) in the case of *Ranjit Kaur a/p Gopal Singh v. Hotel Excelsior (M) Sdn Bhd (supra)* as quoted above to bring home the point on the underlying objectives and purposes of the Act.

**Conclusion**

**[46]** Based on the above reasons, we had unanimously dismissed the appeal with costs of RM10,000 for respondents 1 to 3, and RM10,000 for respondent 4. Deposit was to be refunded.